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From Rules of Civil Procedure for the District Courts of the State of New Mexico

IN THE

Supreme Court of the United States

October Term, 1949

G. PULLEN JACKSON AND FRANK L. HORAN, a Partnership, practicing under the name of JACKSON AND HORAN, Petitioners.

v.

HARRY V. VANCE, Trustee of the Estate of WILLIAM O. STUART; and ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK, Respondents.

BRIEF OF PETITIONERS

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

1. That the decision in this case, which is included in and made a part of the record herewith (Tr. 51, 57), is in direct conflict with Sherman vs. Buckley, 119 F (2d) 280, cert. denied, 86 L. ed 527, 314 U. S. 657, decided by the Court of Appeals, Second Circuit. Mr. Justice Murrah of the Tenth Circuit dissented from the majority opinion, stating:

> "In my view, this case is not different from Sherman vs. Buckley, 119 F. 2d 280, and I would reverse the judgment on the authority of that case."

2. That an important question of Federal law has not

been, but should be, settled by the United States Supreme Court.

3. That the Court of Appeals has decided a Federal question in a way which is probably in conflict with the decisions of this Court.

STATEMENT OF CASE

This action is to enforce an attorneys' lien on the proceeds of a cause of action adjudicated by the District Court of Bernalillo County, State of New Mexico. The petitioners were the first attorneys of record for the plaintiffs in the case of W. O. Stuart, et al. vs. Pacific National Fire Insurance Company, et al, No. 37588, District Court, County of Bernalillo, State of New Mexico.

The bankrupt owned a stock of merchandise on the 28th day of January, 1947, covered by $125,000.00 of insurance, which was destroyed by fire on such date.

The bankrupt employed petitioners, attorneys, on the first day of February, 1947, by written contract to prosecute his claim against certain insurance companies. The insurance was carried by three separate companies and it was necessary to prepare three Notices of Claim and three long and complicated Proofs of Loss, which were duly prepared by petitioners and submitted to the three insurance companies. Negotiations were thereupon entered into for settlement and depositions taken. Said Notices and Proofs were a condition precedent to recovery against the insurance companies. In this connection, specific reference is made to State Court's Order (Tr. 1), hereafter referred to in this brief.

After extended negotiations with the insurance companies, petitioners were unable to effect a settlement and thereupon filed a suit against the insurance companies in the District

Court of Bernalillo County, State of New Mexico on June 16, 1947 (Tr. 1).

Thereafter, on July 12, 1947, petitioners filed an Amended Complaint, which asked judgment against the three insurance companies in the total sum of $125,000.00.

On June 16, 1947, involuntary bankruptcy proceedings were filed against Stuart, and on June 19, 1947, Stuart confessed bankruptcy and was adjudicated bankrupt in the U. S. District Court for the District of New Mexico. Before the suit in the State Court came to issue, Harry V. Vance, as trustee for the bankrupt, filed a motion to be substituted as party-plaintiff and asked for removal of petitioners. On August 20, 1947, Stuart and the petitioners filed a motion to strike the motion of Harry V. Vance, the trustee. Harry V. Vance was substituted as plaintiff in the place of Stuart, and he installed Threet and Hall as attorneys for said trustee. The State Court thereupon entered an order (Tr. 1) fixing a charging and retaining lien in favor of Jackson and Horan in the amount of 15% of all monies to be recovered in the litigation.

A Second Amended Complaint was filed by the trustee, September 9, 1947, making the Albuquerque National Trust and Savings Bank a party-defendant and on the same date, the bank, through its attorneys, accepted service.

On the 8th day of October, 1947, the Albuquerque National Trust and Savings Bank filed its Answer and Cross-Complaint, asking judgment for $60,000.00 against the insurance companies on a series of notes secured by warehouse receipts and executed by Stuart. On March 25, 1948, the insurance companies filed their respective Answers.

The Trustee in Bankruptcy continued to invoke the jurisdiction of the State Court in the litigation against the insurance companies up to and until the insurance com-

panies settled and a satisfaction of judgment was entered in the State Court on the 25th day of October, 1948 (Tr. 5, 48).

On September 3, 1948, petitioners discovered that the insurance companies, acting through their attorney, had entered into an agreement with the Albuquerque National Trust & Savings Bank for a stipulated judgment of $60,000.00 to be paid to the bank directly, ignoring petitioners' lien and bankruptcy proceeding. Whereupon petitioners obtained an injunction against the insurance companies and the bank in the State Court litigation restraining them from carrying out such an agreement until the lien of the petitioners was satisfied coincident with the payment to the Bank. The Trustee in Bankruptcy thereupon obtained a restraining order from the United States District Court for the District of New Mexico restraining petitioners from attempting to enforce their lien in the State Court (Tr. 3).

As will appear from Judge Kool's Order (Tr. 1), fixing the lien for services of petitioners, the Trustee in Bankruptcy by the terms of the same Order was permitted to intervene and was represented by his attorneys, Threet and Hall. More than a year had elapsed since the said Order, which was final and appealable, but the Trustee in Bankruptcy and his attorneys did not appeal from said Order to the Supreme Court of New Mexico. Instead, the Trustee in Bankruptcy continued to submit to and invoke the jurisdiction of the State Court in the case until final judgment (Tr. 5) was entered and satisfied. Furthermore, neither the Trustee in Bankruptcy nor his attorneys took any steps whatever to prevent the payment by the insurance companies to the bank, rather than to the Trustee in Bankruptcy (Tr. 3).

More than four months elapsed between the contract of employment of the petitioners (Tr. 1) and the adjudication of Bankruptcy (Tr. 25).

SPECIFICATION OF POINTS RELIED UPON AS ERROR.

I.

The Trial Court erred in holding and finding that no lien had been created by the contract between Stuart and petitioners, as confirmed by the Order, Judgment and Decree of the District Court of the Second Judicial District within and for the County of Bernalillo, State of New Mexico.

II.

The Trial Court erred in granting the injunction restraining the petitioners from pursuing their remedies in the State Court to enforce the petitioners' retaining and charging lien.

III.

The Trial Court erred in holding that the State Court had no jurisdiction to award petitioners a lien on the fund which was created largely through their efforts, inasmuch as the Trustee in Bankruptcy caused himself to be made party-plaintiff in the State Court litigation and invoked that State Court's jurisdiction until final judgment was entered in the State Court. The Trustee thereby availed himself of the services theretofore rendered in the State Court by the lien claimants, and submitted to and invoked the State Court's jurisdiction as to all things including the lien of these lien claimants, which he now seeks to avoid.

IV.

The Trial Court erred in holding as a nullity the judgment of the State Court awarding lien claimants a charging and retaining lien.

V.

The Trial Court's holding that the judgment of the State

Court awarding lien claimants a retaining and charging lien was not res judicata is an error since it affirmatively appears that the time for appeal from said judgment awarding said lien, i.e., one year, had long since expired at the time the matter was passed upon by the Trial Court in this cause.

ARGUMENTS AND AUTHORITIES

Point I.

THE TRIAL COURT ERRED IN HOLDING AND FINDING THAT NO LIEN HAD BEEN CREATED BY THE CONTRACT BETWEEN STUART AND PETITIONERS AS CONFIRMED BY THE ORDER, JUDGMENT AND DECREE OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT WITHIN AND FOR THE COUNTY OF BERNALILLO, STATE OF NEW MEXICO.

The question of an attorney's right to a lien upon a fund which by his efforts he has aided in creating has been settled by the Supreme Court of the State of New Mexico in the case of *Prichard v. Fulmer*, 22 N. M. 134, 159 P. 39, 2 A. L. R. 474.

The court, in that case recognizes and approves the rule of law that an attorney has a retaining lien upon the papers, documents and money that come into his hands professionally as an attorney and that he is entitled to retain possession of such papers, documents and money until the money due him for professional services is paid, and also holds that it is the right and duty of the State Court to preserve and protect such lien and further recognizes the power of the court to interfere and prevent payment by the judgment debtor in fraud of the attorney's rights. The court in that case said:

"The courts also recognize . . . and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same and also to prevent or set aside assignments and settlements made in fraud of his rights."

Point II.

THE TRIAL COURT ERRED IN GRANTING THE INJUNCTION RESTRAINING THE PETITIONERS FROM PURSUING THEIR REMEDIES IN THE STATE COURT TO ENFORCE THE PETITIONERS' RETAINING AND CHARGING LIEN.

The District Court of Bernalillo County, New Mexico, had jurisdiction to enter its restraining order against the defendant insurance companies in the case pending before itself (the State District Court) and had jurisdiction to enforce the Order fixing a lien which it had previously entered and the United States District Court was without jurisdiction sitting as a court of bankruptcy to interfere with the State District Court by entering its injunction against the petitioners herein.

The case of *Prichard v. Fulmer* (supra) establishes the right of an attorney to have the court intervene on his behalf to prevent payment of a judgment in fraud of the attorney's rights to compensation for his services in such court. It is clear that the State Court, by entering its temporary restraining order, was undertaking, in accordance with the ruling enunciated in the *Prichard* case, to protect the rights of its attorneys and officers and to effect payment of their just compensation as determined by the court (*O'Hara v. Oakland Co.*, 136 F. (2d) 152, 6 CCA).

The right of the State Court to so act is also recognized in the case of *Sherman v. Buckley*, 119 F. (2d) 280, Circuit Court of Appeals, Second Circuit, decided April 28, 1948.

Certiorari was denied by the Supreme Court of the United States, 86 L. ed. 527, 314 U. S. 657. This case is squarely in point with the case at bar. The attorneys in the *Sherman* case were employed before bankruptcy, they eventually secured a judgment after bankruptcy, and then proceeded to enforce their lien. The Trustee in Bankruptcy applied to the Federal Bankruptcy Court for an Order enjoining the attorneys from prosecuting their claim in the State Court on the grounds that the State Court had no jurisdiction over the recovery because the right of action was an asset in bankruptcy.

The United States District Court, upon hearing, held that the State Court had no jurisdiction to liquidate the lien and for this reason it enjoined the attorney from proceeding in that Court. However, the Circuit Court of Appeals, speaking through Mr. Justice Hand, held that the State Court did have jurisdiction and that when the Trustee in Bankruptcy became a party to the cause in the State Court, he subjected himself to the jurisdiction of the State Court for all purposes. The court further said that in support of the act, the jurisdiction of the bankruptcy court is usually held to be exclusive, but it may consent to have the interest of third persons in property of which the bankrupt had possession, adjudicated in a State Court if that is more convenient, and that it necessarily follows that the trustee consented to the exercise of that court's jurisdiction. To the same effect see *In re Prudence*, 96 F. (2d) 157, Certiorari denied 83 L. ed. 393, 305 U. S. 616-617. See also *In re San Juan Gold, Inc.*, 96 F. (2d) 60.

The majority opinion of the Court of Appeals, Tenth Circuit, places its decision on the grounds that the facts of this case and *Sherman vs. Buckley* (supra) are distinguishable (Tr. 55). Your petitioners can see no distinction between the cases and neither could Mr. Justice Murrah (Tr. 57).

As the record discloses petitioners have followed the *Sherman* case since the inception of this action because it is the only reported authority in point.

In the *Prudence* case, the attorney had prosecuted litigation on behalf of a client whose bankruptcy intervened before the litigation was completed, and had been subsequently denied his agreed fee by the Federal District Court, the Circuit Court of Appeals held that, since the attorney had a lien for his services, the intervening bankruptcy did not invalidate such lien and the attorney was entitled to enforce his lien in the bankruptcy court upon the terms and conditions of his contract with the bankrupt.

The petitioners here had a valid and subsisting lien fixed by the court where the litigation was pending. Their contract was entered into more than four months prior to bankruptcy and under the law established by the two preceding cases, the United States District Court for New Mexico erred in interfering with the State Court in protecting the rights of the State Court's attorneys.

Point III.

THE TRIAL COURT ERRED IN HOLDING THAT THE STATE COURT HAD NO JURISDICTION TO AWARD THE PETITIONERS A LIEN ON THE FUND WHICH WAS CREATED LARGELY THROUGH THEIR EFFORTS INASMUCH AS THE TRUSTEE IN BANKRUPTCY CAUSED HIMSELF TO BE MADE PARTY-PLAINTIFF IN THE STATE COURT LITIGATION, AND INVOKED THAT STATE COURT'S JURISDICTION UNTIL FINAL JUDGMENT WAS ENTERED IN THE STATE COURT, THE TRUSTEE HEREBY AVAILED HIMSELF OF THE SERVICES THERETOFORE RENDERED IN THE STATE COURT BY THE LIEN CLAIMANTS, AND SUBMITTED TO

AND INVOKED THE STATE COURT'S JURISDICTION AS TO ALL THINGS INCLUDING THE LIEN OF THESE LIEN CLAIMANTS, WHICH HE NOW SEEKS TO AVOID.

The court having jurisdiction of a cause has authority to establish, evaluate, and provide for the payment of the court costs, including the fees of its attorneys (*Fox v. Loflund*, 98 F. (2d) 589). It may make such findings effective by retaining so much of the funds recovered as passed through its hands.

In this case, the State Court did evaluate the services and recognized the existence of the lien (Tr. 1) and then to make its findings effective, impressed the lien upon such proceeds as might be recovered.

This left the Trustee in Bankruptcy with three alternatives: (*Sherman v. Buckley* and *In re Prudence* (supra)).

1. He could dismiss the case without prejudice and avoid such lien, since no Answer had been filed (Rule 41 (a) 1, Rules of the District Courts of the State of New Mexico, New Mexico Statutes, 1941, Annotated, 19-101 41 (a) 1), and he could start over without liability to appellants.

2. He could appeal to the Supreme Court of the State of New Mexico from the Order of the State Court recognizing the attorneys' lien.

3. He could go ahead with the pending lawsuit against the insurance companies, subject to the lien in favor of Jackson and Horan (*In re Prudence*).

As a matter of fact, the trustee followed the third procedure. Whether he did so because he thought the recovery would be nominal or because he thought the Order invalid, makes no difference. In any event, he availed himself and took advantage of the services theretofore rendered by

Jackson and Horan (*Buell v. Kanawah Lumber Corporation*, 201 F. 762), and continued to invoke the State Court's jurisdiction until recovery from the insurance companies was made.

The respondents eagerly accepted the $60,000.00 made available through the efforts of petitioners but with equal enthusiasm sought and still seek to avoid paying them for their work.

Point IV.

THE TRIAL COURT ERRED IN HOLDING AS A NULLITY THE JUDGMENT OF THE STATE COURT AWARDING LIEN CLAIMANTS A CHARGING AND RETAINING LIEN.

The Trial Court in holding that the judgment of the State Court was a nullity was patently in error and contrary to well-established principles of law. The Order of the State Court was a final order under the holdings of the Supreme Court of New Mexico before the present rules were adopted, which do not change the definition of an appealable order. In the case of *Nehr v. Crawford*, 10 N. M. 725, 65 P. 156, the Supreme Court of New Mexico held that a decree allowing compensation to a Master and his attorney was a final judgment or decision from which an appeal could be taken.

It clearly appears from the record that the Trustee in Bankruptcy did not appeal from the Order and it still stands in full force and effect. It is well established also that when a party and persons in privy with him subjects himself to the jurisdiction of the court and litigates matters before it, he, as well as his privies, is barred from any new action upon the same cause of action, even though the original judgment may have been erroneous or the court which rendered it may have been mistaken as to the facts or may have misconstrued the law or may have disregarded public policy (*Clegg v. U. S.*, 112 F. (2d) 886 CCA 10th).

Point V.

THE TRIAL COURT'S HOLDING THAT THE JUDGMENT OF THE STATE COURT AWARDING PETITIONERS A RETAINING AND CHARGING LIEN WAS NOT RES JUDICATA IS AN ERROR SINCE IT AFFIRMATIVELY APPEARS THAT THE TIME FOR APPEAL FROM SAID JUDGMENT AWARDING SAID LIEN HAD LONG SINCE EXPIRED AT THE TIME THE MATTER WAS PASSED UPON BY THE TRIAL COURT IN THIS CAUSE.

The policy of the law is to prevent interminable delay in litigation and repetition of hearings on questions previously decided.

This principle holds final an order of a court of competent jurisdiction on a matter decided between two parties or their privies, the decision being final after a fixed time for appeal has passed. The Albuquerque National Trust & Savings Bank was a party to the litigation and equally bound with all other parties.

In the instant case, petitioners had filed the Complaint and were subject to the jurisdiction of the court. The insurance companies had been served with process and they were under the jurisdiction of the court. The Trustee in Bankruptcy had himself substituted as party-plaintiff and deliberately brought himself under the jurisdiction of the court (Tr. 1). The only party to this appeal who was not a party to the hearing before the State Court was the bank and it subsequently became a party when it was made a party-defendant by the action of the Trustee in Bankruptcy.

The defendant insurance companies, the defendant bank and the Trustee in Bankruptcy entered into a consent judgment in the State Court in the proceedings instituted by the petitioners and satisfied that judgment in the State Court.

The bank never at any time raised any objection in the State Court to the lien fixed by that court in favor of the petitioners.

In fact, neither the trustee nor the bank took any action of record from August 21, 1947, to October 25, 1948, to avoid said lien. The time for taking an appeal from the District Courts of New Mexico to the Supreme Court of New Mexico is 90 days (Rule 5, Rules of the Supreme Court of New Mexico, Sec. 19-201 (5), New Mexico Statutes, 1941, Annotated). The actual time between the Order and the first record of objection of the respondents here is more than 13 months when they appealed to the Federal Court for injunctive relief.

Since the time for filing an appeal had passed, the Order of the District Court of Bernalillo County was res judicata between Jackson and Horan on the one hand and the Trustee in Bankruptcy and the bank on the other.

The respondents litigated the question of petitioners' lien in the State Court but when they discovered the Order was burdensome, they immediately moved to another forum and again litigated the questions previously determined. It is therefore apparent that they have twice had their day in court. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522, 75 L. ed. 1244; *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. ed. 230.

It is therefore respectfully submitted that the Order and Judgment of the United States District Court for the District of New Mexico and the affirming judgment of the United States Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dissolve the injunction against the petitioners enforcing their lien for attorneys' fees as fixed by the State Court, and to set aside its Order directing the Referee in Bankruptcy to

ignore the lien of the State Court and to fix a reasonable attorneys' fee, and to order the Referee in Bankruptcy and the Trustee to forthwith pay the petitioners' lien for the attorneys' fees in the sum of $9,000.00, together with interest at the rate of six (6) per cent from December 7, 1948, the date of final judgment in the State Court.

ARTHUR T. HANNETT

Attorney for Petitioners

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REPLY BRIEF OF PETITIONERS

Respondent states that petitioners filed an inadequate transcript with the U. S. Circuit Court of Appeals.

Petitioners quite readily admit that this is true and further state that the record is really inadequate today, but unfortunately petitioners do not have a bank financing them and financial circumstances would not permit a complete transcript of the record.

Respondents further state that petitioners have gone outside of the record at Page 4 of their brief. Perhaps petitioners have, but we believe that the order of Judge Arledge (Tr. 47) adequately supports statement made by petitioners and it is further interesting to note that respondents do not deny its veracity.